Abraham Grossman d/b/a Bruckner Nursing Home *and* Local 1115, Joint Board, Nursing Home and Hospital Employees Division

Local 144, Hotel, Hospital, Nursing Home & Allied Health Services Union, S.E.I.U., AFL-CIO *and* Local 1115, Joint Board, Nursing Home and Hospital Employees Division. Cases 2-CA-13636 and 2-CB-5808

July 16, 1982

DECISION AND ORDER

On October 23, 1975, Administrative Law Judge Almira Abbott Stevenson issued the attached Decision in this proceeding. Thereafter, Respondent Union filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herein.

The facts of the case are not in dispute and may be briefly summarized as follows:

In the spring of 1974, Local 144, Hotel, Hospital, Nursing Home & Allied Health Services Union, S.E.I.U., AFL-CIO (hereinafter referred to as Local 144), and Local 1115, Joint Board, Nursing Home and Hospital Employees Division (hereinafter referred to as Local 1115), began organizational activities at Respondent Employer's nursing home facility in New York, New York. In early September 1974, Local 144 notified the Employer that it possessed a majority of signed authorization cards, and a date was set for a card count. Shortly thereafter, Local 1115 sent a mailgram to the Employer which stated that it was engaged in organizational activity among the Employer's employees and that the Employer should not extend recognition to any other labor organization. On September 23, 1974, Local 1115 filed charges against the Employer and Local 144 alleging violations of Sections 8(a)(1) and 8(b)(1)(A) through interference with the employees' right to select a union of their choice.

The card count was conducted on September 27, 1974, by an extension specialist of the New York State School of Industrial and Labor Relations. Thereafter, the extension specialist informed the Employer that Local 144 represented a majority of its employees. Local 144 subsequently requested negotiations, but the Employer refused pending the outcome of the unfair labor practice charges filed by Local 1115.

On November 29, 1974, the unfair labor practice charges filed by Local 1115 were dismissed by the Regional Director. Negotiations between Local 144 and the Employer commenced shortly thereafter and culminated in the execution of a collective-bargaining agreement on December 18, 1974. Local 1115 then filed, on March 7, 1975, the charges at issue in this proceeding.

On September 27, 1974, the date of the card check, Respondent Employer had approximately 125 people in its employ. At that time, Local 1115 had two authorization cards, while Local 144 possessed signed authorization cards from approximately 80 to 90 percent of the Employer's employees. No representation petition was filed on behalf of either labor organization in this proceeding.

With respect to the foregoing facts, the Administrative Law Judge found that Local 1115 possessed a "colorable claim" to representation herein based on its continuous efforts to obtain employee support during the fall of 1974, and the fact that it had actually obtained a few authorization cards. The Administrative Law Judge concluded that the Employer "by executing a collective-bargaining agreement . . . in the face of a real question concerning representation which had not been settled [by] the special procedures of the Act" had rendered unlawful assistance to Local 144 in violation of Section 8(a)(2) of the Act. In what has become a standard remedy in this type of setting, the Administrative Law Judge ordered that the Employer cease giving effect to the collective-bargaining agreement with Local 144, and further ordered the Employer to withdraw and withhold recognition from Local 144 unless and until it has been certified in a Board-conducted election.

In this and a companion case, *RCA del Caribe, Inc.*, 262 NLRB No. 116 (1982) (Chairman Van de Water and Member Jenkins dissenting), we undertake a reevaluation of what has come to be known as the *Midwest Piping*[1] doctrine, a rule which, in one form or another, has been part of Board law for over 35 years. In *RCA del Caribe*, we set forth a new policy with respect to the requirements of employer neutrality when an incumbent union is challenged by an "outside" union. In this case, we will focus our attention on initial organizing situations involving two or more rival labor organizations.

As originally formulated, the "*Midwest Piping* doctrine" was an attempt by the Board to insure that, in a rival union situation, an employer would not render "aid" to one of two or more unions competing for exclusive bargaining representative status through a grant of recognition in advance of a Board-conducted election. In *Midwest Piping* itself, the Board found that an employer gave unlawful assistance to a labor organization when the

[1] *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945).

employer recognized one of two competing labor organizations, both of which had filed representation petitions, and both of which had campaigned extensively for the mantle of exclusive bargaining representative. In the context of that case, we held that the employer had arrogated the resolution of the representation issue, and that a Board-conducted election was the "best" means of ascertaining the true desires of employees. We further stated that employers presented with rival claims from competing unions (in the form of representation petitions) should follow a course of strict neutrality with respect to the competing unions until such time as the "real question concerning representation" had been resolved through the mechanism of a Board-conducted election.[2]

In cases that followed soon thereafter, we applied the principle that the duty of strict employer neutrality and the necessity of a Board-conducted election were operative only when a representation petition had been filed with the Board, and further noted that the "doctrine" should be "strictly construed" and "sparingly applied."[3]

In subsequent decisions, the Board removed the requirement that a representation petition actually be filed, stating that a petition was not a prerequisite to the finding of a "real" or "genuine" question concerning representation.[4] The removal of the prerequisite of a petition stemmed in part from the need to recognize the existence of a rival union contest even before formal invocation of the Board's election procedures so as to insure that those procedures would be available. If more than one union enjoyed at least some employee support, we perceived a Board-conducted election as the best way, often the only way, to guarantee employees a fair and free opportunity to make the final choice of a bargaining representative. Although often unstated, another reason for removing the petition requirement in a rival union setting was to preclude the serious possibility of employer abuse where no petition had been filed. Often we were faced with the scenario of a union presenting a substantial showing of majority support based on cards which the employer would reject while invariably professing a preference for the Board's election procedures. A short time thereafter, the employer would recognize another union and, typically, sign a contract in a remarkably accelerated bargaining process. This scenario was played once too often, so we determined that in order to protect the democratic right of employees to their own collective-bargaining representative, and to prevent employer abuse, we would require an election whenever there were two or more unions on the scene, and each had some support or organizational interest in the unit sought. We defined the "interest" that a union must have to trigger the operation of the *Midwest Piping* doctrine as a "colorable claim," a claim that was not "clearly unsupportable," or a claim that was not "naked."[5] Thus, we held that the original *Midwest Piping* requirement of strict employer neutrality would be operative where a question concerning representation existed even though no petition had been filed unless and until a Board-conducted election had been held and the results certified.

Difficulties with this modification of the original *Midwest Piping* decision arose in defining precisely what was meant by the terms "naked claim," "clearly unsupportable claim," and "colorable claim." Inevitably we were called upon to make close judgments as to whether 8 cards in a unit of over 90 employees made a colorable claim,[6] whether prior organizational activity constituted a clearly unsupportable claim,[7] or whether an expressed interest in organizing a certain group of employees was simply a naked claim.[8] While attempting to maintain flexibility and to decide these questions on a case-by-case basis, we were unable to provide employers, unions, and employees alike with clear standards that would enable them to discern the fine line between a colorable claim and a naked one.

Extending the *Midwest Piping* doctrine frequently allowed a minority union possessing a few cards to forestall the recognition of a majority union in an effort either to buy time to gather more support for itself or simply to frustrate its rivals. For instance, here, where one union enjoys overwhelming support and the other has but a few cards, collective bargaining would be delayed until the 8(a)(2) charge has been resolved and the results of a later Board-conducted election have been certified. This delay would occur simply because an employer has done what in the absence of a rival claimant it may (but by no means has to) do in recognizing a majority union based on authorization cards. Ironically, in this factual setting, invoking "employee free choice" to justify Board intervention would clearly impede and frustrate the expression of employee preference, as well as the collective-bargaining

[2] *Midwest Piping and Supply Co., Inc., supra.*

[3] *Ensher, Alexander & Barsoom, Inc.*, 74 NLRB 1443 (1947).

[4] See, e.g., *Pittsburgh Valve Company, et al.*, 114 NLRB 193 (1955), enforcement denied 234 F.2d 565 (4th Cir. 1956).

[5] *Playskool, Inc., a Division of Milton Bradley Company*, 195 NLRB 560 (1972), enforcement denied 477 F.2d 66 (7th Cir. 1973).

[6] *American Bread Company*, 170 NLRB 85 (1968), enforcement denied 411 F.2d 147 (6th Cir. 1969).

[7] *Playskool, Inc., supra.*

[8] *Robert Hall Gentilly Road Corporation, d/b/a Robert Hall Clothes, et al.*, 207 NLRB 692 (1973).

process. For here, where employees have made a free choice and the employer has recognized that choice, the ultimate aim of that choice—the establishment of a collective-bargaining relationship and the benefits flowing therefrom—could not be achieved because another union has a "colorable claim" to representation.

Meanwhile, circuit courts refused to enforce many of our decisions based on "modified" *Midwest Piping* violations. The courts took a distinctly different approach to the problems presented by the rival union situation.[9] Whereas the Board viewed the matter in terms of protecting employee free choice and the integrity and efficacy of our election process, the courts took the view that the question concerning representation was resolved whenever an employer recognized a bona fide majority claimant and had not actually aided, in the traditional 8(a)(2) sense of that word, the recognized labor organization. At the point an unassisted majority union had been recognized, the courts considered the matter settled, and the question concerning representation resolved.[10] However, reiterating its concern for the Section 7 rights of employees and employer manipulation of the recognition process, the Board held to the view that our election machinery was still the optimum means of resolving the rival union representation question.[11] Just as often as the Board reaffirmed its adherence to the now "modified" *Midwest Piping* doctrine, however, the courts of appeals refused to enforce our decisions finding 8(a)(2) violations on this basis.[12]

We have reviewed the Board's experience with *Midwest Piping* with a desire to accommodate the view of the courts of appeals in light of our statutory mandate to protect employees' freedom to select their bargaining representatives and in harmony with our statutory mandate to encourage collective bargaining. Having identified the difficult problems in this area, it is the Board's task to reconcile the various interests of policy and law involved in fashioning a rule which will give, as far as possible, equal consideration to each of those interests in the light of industrial reality. We have concluded that this task has not been accomplished through the modified *Midwest Piping* doctrine. Accordingly, we will no longer find 8(a)(2) violations in rival union, initial organizing situations when an employer recognizes a labor organization which represents an uncoerced, unassisted majority, before a valid petition for an election has been filed with the Board.[13] However, once notified of a valid petition, an employer must refrain from recognizing any of the rival unions. Of course, we will continue to process timely filed petitions and to conduct elections in the most expeditious manner possible, following our normal procedures with respect to intervention and placement of parties on the ballot.

Making the filing of a valid petition the operative event for the imposition of strict employer neutrality in rival union, initial organizing situations will establish a clearly defined rule of conduct and encourage both employee free choice and industrial stability. Where one of several rival labor organizations cannot command the support of even 30 percent of the unit, it will no longer be permitted to forestall an employer's recognition of another labor organization which represents an uncoerced majority of employees and thereby frustrate the establishment of a collective-bargaining relationship.[14] Likewise, an employer will no longer have to guess whether a real question concerning representation has been raised but will be able to recognize a labor organization unless it has received notice of a properly filed petition.

On the other hand, where a labor organization has filed a petition, both the Act and our administrative experience dictate the need for resolution of

[9] See, e.g., *American Bread Company, supra; Pittsburgh Valve Company, supra; Plevskool, Inc., supra; Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel*, 201 NLRB 139 (1973), enforcement denied 507 F.2d 411 (9th Cir. 1974).

[10] *Air Master Corporation, etc.*, 142 NLRB 181 (1963), enforcement denied 339 F.2d 553 (3d Cir. 1964).

[11] See *Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel, supra* at fn. 12.

[12] E.g., *Suburban Transit Corp.*, 203 NLRB 465 (1973), enforcement denied 499 F.2d 78 (3d Cir. 1974), cert. denied 419 U.S. 1089.

[13] Although an employer will no longer automatically violate Sec. 8(a)(2) by recognizing one of several rival unions before an election petition has been filed, we emphasize that an employer will still be found liable under Sec. 8(a)(2) for recognizing a labor organization which does not actually have majority employee support. *International Ladies' Garment Workers' Union, AFL–CIO [Bernhard-Altmann Texas Corporation]* v. *N.L.R.B.*, 366 U.S. 731 (1961). This longstanding principle applies in either a single or rival union organizational context and is unaffected by the revised *Midwest Piping* doctrine announced in this case. For instance, if an occasion arises where an employer is faced with recognition demands by two unions, both of which claim to possess valid authorization card majority support, the employer must beware the risk of violating Sec. 8(a)(2) by recognizing either union even though no petition has been filed. In such a situation, there is a possibility that the claimed majority support of the recognized union could in fact be nonexistent. Consequently, the safe course would be simply to refuse recognition, as clearly authorized under *Linden Lumber Divison, Summer & Co.* v. *N.L.R.B.*, 419 U.S. 301 (1974). Either of the unions or the employer could then file a representation petition.

[14] The filing of a valid petition by at least one of the competing unions indicates that it has substantial support in the petitioned-for unit. Based on broad experience in conducting elections, we have defined "substantial" in a representational context to mean that a union has at least 30-percent support in the unit sought. The 30-percent figure was arrived at pragmatically by the Board as a measure of whether or not there is sufficient union support to justify the effort and expense of a Board-conducted election. Experience showed that, when no labor organization had at least 30-percent support, the chances of achieving majority support for union representation were too remote to justify an election. We likewise regard the failure of a rival union to muster at least a 30-percent showing of interest to be a reliable indication that an election held solely at that union's request would be unnecessary.

the representation issue through a Board election rather than through employer recognition. When a union has demonstrated substantial support by filing a valid petition, an active contest exists for the employees' allegiance. This contest takes on special significance where rival unions are involved since there an employer's grant of recognition may unduly influence or effectively end a contest between labor organizations. As long ago as 1938, the Supreme Court noted that, in enacting Section 8(a)(2) and (1) of the Act, Congress had been influenced by "data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other."[15] Without questioning the reliability of authorization cards or unduly exalting election procedure, we believe the proper balance will be struck by prohibiting an employer from recognizing any of the competing unions for the limited period during which a representation petition is in process even though one or more of the unions may present a valid card majority.[16]

In addition to avoiding potential undue influence by an employer, our new approach provides a satisfactory answer to problems created by execution of dual authorization cards. It is our experience that employees confronted by solicitations from rival unions will frequently sign authorization cards for more than one union. Dual cards reflect the competing organizational campaigns. They may indicate shifting employee sentiments or employee desire to be represented by either of two rival unions. In this situation, authorization cards are less reliable as indications of employee preference. When a petition supported by a 30-percent showing of interest has been filed by one union, the reliability of a rival's expression of a card majority is sufficiently doubtful to require resolution of the competing claims through the Board's election process.

Our reevaluation of the *Midwest Piping* doctrine to find the proper balance between statutory purposes is entirely consistent with the judicial acceptance of authorization cards as at least one reliable indicator of employee sentiment. At the time of the original *Midwest Piping* decision and even up until 1969, reliance on authorization cards as an appropriate measure of employee support had not received the sanction of the Supreme Court. After *Gissel*[17] and *Linden Lumber*,[18] it was settled that, while a Board-conducted election was still the optimum vehicle for ascertaining employee preferences, it was certainly not the sole means to that end. The phenomenon of dual cards in a rival union organizational setting must be taken into account, but can no longer solely justify our absolute refusal to rely on cards in *Midwest Piping* situations, particularly since we regard them as a reliable means of ascertaining the wishes of a majority of employees in other organizational settings. However, while some courts of appeals have expressed the view that an employer may lawfully recognize one of two or more competing labor organizations even in the face of a pending petition,[19] our view continues to be that, once a properly supported petition is filed, the employer may not circumvent an election by granting recognition to one of the competing unions.

In sum, under our new formulation, the duty of strict employer neutrality and the necessity for a Board-conducted election attach only when a properly supported petition has been filed by one or more of the competing labor organizations. Where no petition has been filed, an employer will be free to grant recognition to a labor organization with an uncoerced majority, so long as it does not render assistance of the type which would otherwise violate Section 8(a)(2) of the Act.

Applying the principles outlined above to the facts of the instant case, it is clear that no petition was filed by either of the rival unions and that the Employer recognized a clear majority claimant in extending recognition to Local 144. Accordingly, inasmuch as no petition was filed and recognition was granted to a labor organization with an uncoerced, unassisted majority, we shall dismiss the instant complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint in the instant case be, and it hereby is, dismissed.

MEMBER JENKINS, concurring:

I concur in the dismissal of the instant complaint in view of the fact that the Charging Party Union did not possess the requisite showing of interest to raise a question concerning representation at the

[15] *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938).

[16] Unlike the situation presented in *RCA del Caribe, supra*, there is no incumbent union here and, consequently, interference with an existing collective-bargaining relationship is not an interest to be weighed.

[17] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

[18] *Linden Lumber Division, Summer & Co.* v. *N.L.R.B., supra.*

[19] See, e.g., *District 50, United Mine Workers of America [Pittsburgh Valve Company]* v. *N.L.R.B.*, 234 F.2d 565 (4th Cir. 1956); *N.L.R.B.* v. *Indianapolis Newspapers, Inc.*, 210 F.2d 501 (7th Cir. 1954); *N.L.R.B.* v. *Standard Steel Spring Co.*, 180 F.2d 942 (6th Cir. 1950).

time of recognition and because of the lack of evidence that a minority union was recognized.

As I indicated in *RCA del Caribe, Inc.*, 262 NLRB No. 116 (1982), a substantial degree of support is necessary in a two-union situation to raise a genuine issue of representation; I have proposed 15 percent as sufficient; clearly, it must be more than the *de minimis* we have been accepting.

DECISION

STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: A hearing was held in this proceeding on August 4, 5, 6, and 12, 1975, in New York, New York. The charges were filed in Cases 2-CA-13636 and 2-CB-5808 March 6, and served on the Respondents March 7, 1975. An order consolidating cases and consolidated complaint and notice of hearing was issued May 30, 1975. The hearing was thereafter noticed for August 4, 1975.

The issue is whether or not, under the rule of *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945), the Respondent Company violated Section 8(a)(1), (2), and (3), and the Respondent Union violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, by executing a collective-bargaining agreement December 18, 1974, which contained a union-security clause. For the reasons explained below, I find that the Respondents violated the Act as alleged.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the oral arguments of the parties and the briefs filed by the Respondents, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondents admit, and I find, that Abraham Grossman, an individual, is a proprietor doing business under the trade name and style of Bruckner Nursing Home, the Employer herein; that the Employer maintains an office and place of business at 1010 Underhill Avenue, New York, New York, where it is engaged in providing health care for the aged and infirm; that since about July 9, 1974, the day the Employer commenced operations, it has derived revenues in excess of $500,000 from providing health care to the aged and infirm, purchased goods and materials valued in excess of $50,000, of which goods and materials valued in excess of $10,000 were received from enterprises located in the State of New York which received said goods and materials directly from States other than New York State. The parties admit, and I conclude, that the Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The parties admit, and I conclude, that the Respondent Union Local 144, Hotel, Hospital, Nursing Home & Allied Health Services Union, S.E.I.U., AFL-CIO, and the Charging Party, Local 1115, Joint Board, Nursing Home and Hospital Employees Division, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES[1]

A. *Facts*

The parties admit, and I find, that Abraham Grossman, owner-administrator, and Moshe Zakutinsky, executive housekeeper, are agents of the Respondent Company. I find that James Pagan, business representative, is an agent of the Respondent Union Local 144; and that William Morales, business representative, is an agent of the Charging Party Local 1115.

The Bruckner Nursing Home was built during the fall of 1973 and spring of 1974. It began to hire employees in the late spring, and began to operate as a nursing home about July 9, 1974. Both Local 1115, the Charging Party, and Local 144, the Respondent Union, began organizing drives among the registered nurses, licensed practical nurses, aides, orderlies, housekeeping, and kitchen (dietary) employees in the spring.

On an unspecified date in early September 1974, James Pagan, for Local 144 which had represented employees employed by Grossman in a previous nursing home, informed Grossman that Local 144 represented a majority of the Bruckner employees. As the result of a subsequent conversation between Pagan and Grossman's attorney, Karassik, a date was set for a card count.

Meanwhile, on September 11, 1974, Local 1115 sent a mailgram to the Respondent Company stating as follows:

> This is to inform you that Local 1115 Joint Board Nursing Home and Hospital Employees Division is engaged in an organizational drive and has an interest in your employees accordingly do not extend recognition to any other group or organization and election by the National Labor Relations Board is the only method that made [sic] be used to determine who shall be the collective bargaining representative.

On September 23, 1974, Local 1115 filed unfair labor practice charges in Cases 2-CA-13455 and 2-CB-5678 against both the Respondents alleging violations of Section 8(a)(1) and 8(b)(1)(A) by interfering with the Section 7 rights of the Bruckner employees to select a union of their choice.

On September 27, 1974, the cards obtained by Local 144 were counted by Edward Gonzales, Jr., extension specialist of the New York State School of Industrial and Labor Relations, Cornell University, in the presence of Local 144 Business Representative Pagan and Abraham Grossman. Gonzales compared the signatures on the cards with specimens on W-4 forms of employees in the unit described above. No representative of Local 1115 was invited or present, and no signed Local 1115 authorization cards were presented or considered. In a letter

[1] The evidence is substantially undisputed except where specifically referred to. Pursuant to agreement of the parties at the hearing, the Respondent Employer's payroll for the week ending December 3, 1974, is hereby received in evidence as G.C. Exh. 57.

dated October 3, 1974, Gonzales advised the Respondents the card check revealed that Local 144 represented a majority of the employees in the unit. Although Local 144 representatives requested Grossman and his attorney to begin negotiations, they were not accorded recognition and were advised that there would be no negotiations while unfair labor practice charges were pending.

By letters dated November 29, 1974, the Regional Director advised the parties that no complaint would issue on the unfair labor practice charges in Cases 2-CA-13455 and 2-CB-5678. The Regional Director stated, among other things, that:

> The evidence does not tend to establish that the above-named Company violated the Act as alleged. . . . The evidence establishes that no individual in a position to responsibly act for the Company has unlawfully aided, or assisted Local 144 . . . in its organizational campaign. Further, although the matter was not specifically alleged in [the] charge, the investigation failed to disclose any evidence that the Company unlawfully recognized or bargained with Local 144 while your organization was actively involved in a competing organizational drive. However, in the event that the Company subsequently engages, in disparate treatment of any of the interested unions, the facts uncovered by the investigation of this charge will be reappraised in connection with any new charge that may be filed.

Shortly after receiving the dismissal letters from the Regional Director, Grossman and Karassik entered into negotiations with Pagan and other representatives of Local 144. On December 18, 1974, the parties executed a collective-bargaining agreement which contained a union-security provision requiring membership in Local 144 as a condition of continued employment on and after the 31st day of employment. In accord with this provision, Grossman informed the Bruckner employees that they have to join Local 144 after 31 days of employment, and remitted dues to Local 144 pursuant to employees' checkoff authorizations.

This record does not show how many authorization cards Local 144 obtained, and I can place no reliance on the self-serving ball-park percentage figures recited by Pagan who obtained most of the Local 144 cards, all before the card check. It is clear, however, that Local 1115 was also engaged in an organizing campaign among the Bruckner employees and continued to obtain authorization cards, as found below. I do not credit Morales' testimony as to the frequency with which he allegedly visited the premises, because it was uncorroborated, inconsistent, and I do not believe his recollection of events was accurate; but I find that he did go there occasionally, trying to sign employees up. Moreover, he sent several people who had worked at other places represented by Local 1115 or who were friends of his to apply for jobs at Bruckner, and some of them were hired. In addition, he called a meeting on November 26, 1974, at a luncheonette nearby which 8 or 10 employees attended; and he personally obtained a few authorization cards. The bulk of the Local 1115 cards were obtained by an employee, Adriano Castillero (also referred to in the record as Castillano). There is no credible evidence, however, that management was aware of either Morales' or Castillero's activity in this respect.[2]

The record contains the following evidence as to authorization cards obtained by Local 1115: On September 11, 1974, the date of Local 1115's mailgram advising Bruckner of its organizational drive, it was in possession of authorization cards signed by two employees, Hector Henriques, who had already left Bruckner's employ, and Adriano Castillero. On September 27, the day of the Local 144 card check, Local 1115 authorization cards had been signed by 9 additional employees,[3] for a total of 10 current cards. Three of the signers testified that they also signed authorization cards for Local 144, one before and two after they signed for Local 1115. The Bruckner payroll for the week ending September 24, 1974, lists approximately 125 employees in the unit.[4]

The evidence establishes that between September 27 and November 29, 1974, Local 1115 obtained 13 more valid cards from employees still on the payroll on the latter date.[5] Nine employees who signed these cards testified they also signed Local 144 cards—five before and three after they signed for Local 1115; one was not sure whether it was before or after. As two of the employees who signed valid cards between September 11 and 27 left Bruckner before November 29, Local 1115 had 21 current cards on that date. The Respondent Employer's payroll for the week ending December 3, 1974, lists approximately 140 employees.

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[2] There is no evidence at all that management observed Castillero's activity. I credit the testimony of Grossman, Supervisor Zakutinsky, and Pagan that they never saw Morales at or near the premises. Morales admitted he never went into the nursing home, and that he never spoke to Grossman and did not know him by sight. Zakutinsky's demeanor was impressive and his testimony was not impeached in any respect, while the reverse is true of Morales on both counts. I therefore credit Zakutinsky's denial that a meeting between the two described by Morales ever took place.

[3] Only those Local 1115 authorization cards in evidence, which were authenticated by witnesses or by comparison with a known specimen of the signer's handwriting in evidence to have been executed by employees on the Bruckner payroll on the dates signed or thereafter, have been counted for purposes of this case. *The Colson Corporation* v. *N.L.R.B.*, 347 F.2d 128, 134 (8th Cir. 1965); *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (2d Cir. 1962). The signature on a card bearing the name of Luz Llanos does not match the specimen and has not been counted. Cards for which a signature date was not established have not been counted. However, those on which the month and day figures are reversed have not gone uncounted for that reason. I have counted the card of Miguel Nieves who apparently signed the membership application on September 25, even though an additional signature at the bottom of the card is dated October 2, 1974.

[4] All figures given herein for the number of employees on the payroll are imprecise because unit status was not completely developed.

[5] The following cards have not been counted: the signature on the card bearing the name of John Lightbourne does not appear to be authentic; additional otherwise valid cards have not been counted because the signers left Bruckner's employ before November 29. I find that Ronald Japiesaud did not effectively revoke his authorization and I have counted his card. Cf. *Local 1384, United Automobile, Aerospace, Agricultural Implement Workers, UAW (Ex-Cell-O Corporation)*, 219 NLRB 729 (1975).

B. *Conclusions*

As indicated, the General Counsel contends that the Respondents committed a *Midwest Piping* violation on December 18, 1974, by entering into the collective-bargaining agreement containing a union-security provision. The General Counsel argues that a real question of representation existed at that time by virtue of the Local 1115 organizing campaign of which the Respondents were aware, whether or not Local 144 had authorization cards from a majority of the employees. The Respondents assert that they relied on Gonzales' card count establishing a Local 144 majority, which was obtained by that Union without any assistance from Bruckner, and on the Regional Director's dismissal of the unfair labor practice charges filed by Local 1115; that Local 1115 never claimed to represent any of Bruckner's employees and never made its presence known to the Respondents other than by sending its mailgram and filing its charges; that Local 1115 was in possession of only one current authorization card when it sent the mailgram and only a few more when Gonzales counted the Local 144 cards and when the collective-bargaining agreement was executed which were insufficient to establish the existence of a question of representation. Under Board law, I must find these contentions to be without merit.[6]

It is clear that the intent of the *Midwest Piping* rule, as applied by the Board, is to preserve the Section 7 rights of employees to determine freely among themselves who their agent for purposes of collective bargaining shall be by barring an employer from making the choice for them by recognizing or contracting with one of two competing unions.[7] All that is needed to trigger the rule is the existence of a question of representation. It is not required that that question be resolved, but only that the rival union's claim is not clearly unsupportable or specious or otherwise not a colorable claim.[8] That Local 1115 met this requirement is shown by its continuous effort to obtain employee support throughout the fall of 1974, and its success in obtaining some cards.[9] Moreover, it put the Respondents on notice of its competitive status by its mailgram to the Employer and its charges against both.[10] The Respondents cannot therefore rely on the Gonzales card check. Their failure to notify or consider Local 1115 despite their knowledge of its continued interest in representing the employees ruled out the check of only Local 144 cards as an accurate measure of employee choice. This conclusion is further supported by the evidence that a number of employees signed cards for both Unions.[11]

Nor were the Respondents entitled to rely on the Regional Director's dismissal of the unfair labor practice charges as an official go-ahead for according recognition or for them to negotiate a collective-bargaining agreement. The Regional Director was doubtless aware that the card count had taken place, but it was not an unfair labor practice to conduct the card count. Entering into a collective-bargaining agreement with one of two competing unions on the basis of such a card count is an unfair labor practice, but that had not happened yet when the Regional Director dismissed the charges. Nor is it material here that the Regional Director found no evidence that the Employer otherwise extended unlawful aid or assistance to Local 144, or that there is no independent credible evidence to that effect in this record, as the *Midwest Piping* rule operates independently of such evidence.[12] It was incumbent on the Respondents, therefore, after the charges were dismissed, to at least attempt to contact Local 1115 and inquire whether it had abandoned its interest in representing the Bruckner employees before they entered into negotiations.[13]

I conclude that by executing a collective-bargaining agreement containing a union-security clause in the face of a real question of representation which had not been settled under the special procedures of the Act, the Respondent Employer rendered unlawful assistance and support to the Respondent Union, in violation of Section 8(a)(2); discriminated against its employees in a manner discouraging membership in the Charging Party and encouraging membership in the Respondent Union in violation of Section 8(a)(3); and interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. I conclude that by the same conduct the Respondent Union caused the Employer to discriminate against employees in violation of Section 8(a)(3), and thereby violated Section 8(b)(2), and restrained and coerced employees in the exercise of rights guaranteed by Section 7 and thereby violated Section 8(b)(1)(A) of the Act.

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[6] To the extent that the Board's application of the *Midwest Piping* principle conflicts with that of decisions of certain United States Courts of Appeals in cases relied on by the Respondents, the Board has expressed its adherence to its views set forth in the cases cited herein until the Supreme Court passes on the issue. *Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel*, 201 NLRB 139, fn. 12 (1973), enforcement denied 507 F.2d 411 (9th Cir. 1974). I am, of course, required to follow the Board. *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963).

[7] *Kay Jay Corporation d/b/a McKees Rocks Foodland*, 216 NLRB 968 (1975).

[8] See *American Can Company*, 218 NLRB 102 (1975).

[9] *Inter-Island Resorts, Ltd. d/b/a Kona Surf Hotel, supra.* Cf. *Robert Hall Gentilly Road Corporation d/b/a Robert Hall Clothes, et al.*, 207 NLRB 692 (1973), where, unlike here, there was no evidence that the rival union's organizing campaign continued viable during the critical period. *The Boy's Markets, Inc.*, 116 NLRB 105 (1965), enfd. 370 F.2d 205 (9th Cir. 1966) is similarly distinguishable on its facts.

[10] Contrary to the Respondent's contention, Local 1115's status as a competitor for the allegiance of the employees was not compromised by its failure to demand recognition as their representative. *Playskool, Inc., a Division of Milton Bradley Company*, 195 NLRB 560, enforcement denied 477 F.2d 66 (7th Cir. 1973).

[11] *Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel, supra; Playskool, Inc., supra.* The evidence indicates that some of the dual signing took place before and some after the card check; and that some employees signed for Local 1115 before and some after they signed for Local 144. Contrary to the Respondents' contention, the *Snow & Sons* rule (*Fred Snow, Harold Snow, and Tom Snow d/b/a Snow & Sons*, 134 NLRB 709 (1961), enfd. 308 F.2d 687 (9th Cir. 1962)) requiring an employer to bargain with a union after a voluntary card count reveals a card majority is not applicable where as here a known rival union is excluded. *Intalco Aluminum Corporation* v. *N.L.R.B.*, 417 F.2d 36 (9th Cir. 1969); *Henry Book, William Russ and Robert Klein d/b/a Sprain Brook Manor*, 219 NLRB 809 (1975).

[12] *Henry Book, William Russ and Robert Klein d/b/a Sprain Brook Manor, supra; Kay Jay Corporation d/b/a McKees Rocks Foodland, supra.*

[13] See *Rivera Manor Nursing Home, Inc.*, 220 NLRB 124 (1975).

IV. REMEDY

In order to effectuate the policies of the Act, I recommend that the Respondents be ordered to cease and desist from the unfair labor practices found and from infringing in any like or related manner on employee rights guaranteed by the Act.

Having found that the Respondent Employer and the Respondent Union unlawfully entered into a collective-bargaining agreement on December 18, 1974, I recommend that the Employer be ordered to withdraw and withhold recognition from the Respondent Union and that both the Respondents be ordered to cease giving effect to that agreement or to any renewal, modification, or extension thereof until such time as the Respondent Union shall have been certified by the Board as the exclusive representative of the employees in question.

Having found that the Respondents further violated the Act by including in their December 18, 1974, collective-bargaining agreement a union-security provision, I recommend that they be ordered jointly and severally to reimburse all present and former employees for all initiation fees, dues, or other moneys unlawfully collected pursuant to the union-security provision or any extension, renewal, modification, or supplement thereof, with interest at 6 percent per annum.[14]

Nothing herein shall require the Respondent Employer to vary or abandon any wages, hours, seniority, or other substantive feature of its relations with its employees presently in effect.

[Recommended Order omitted from publication.]

[14] *Hudson Berlind Corporation*, 203 NLRB 421 (1973), enfd. 494 F.2d 1200 (2d Cir. 1974); *Playskool, Inc., supra.*